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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 859

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS. No. 27894.

APPELLANT'S REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellant.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

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ILLINOIS COMMERCE COMMISSION,

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JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS. No. 27894.

APPELLANT'S REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

The appellee or appellees in each of the five cases, respectively, now docketed in this court under Nos. 858 to 862, inclusive, the titles of such cases being set forth in the margin,* have filed statements in opposition to this court's

* No. 858—*Illinois Commerce Commission, et al.* v. *Illinois Central Railroad Co.*

No. 859—*Illinois Commerce Commission* v. *Joseph B. Fleming and Aaron Colnon, trustee of Chicago, Rock Island and Pacific Rwy. Co.*

No. 860—*Illinois Commerce Commission* v. *Chicago, Burlington & Quincy Railroad Co.*

No. 861—*Illinois Commerce Commission* v. *Henry A. Scandrett, et al., trustees of property of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*

No. 862—*Illinois Commerce Commission* v. *A. A. Sprague and Bernard J. Fallon, as receivers of Chicago North Shore and Milwaukee Railroad Co.*

jurisdiction. Since these statements, although cast i slightly variant form, all suggest substantially simila arguments, this reply, though copies of it will be printe and filed under each of the five numbers and titles, respec tively, will be identical in all of the five cases.

Appellees' suggestions in opposition to this court's juris diction are premised upon certain basic fallacies and re flect serious misconceptions of appellants' contentions. I our earnest view, these fallacies and misconceptions ca be briefly pointed out.

The Issues Raised by the Emergency Price Control Act.

In appellants' original statement in support of jurisdic tion, it was clearly indicated that the Illinois Commerc Commission and the Attorney General of Illinois, differin with appellees and with the Supreme Court of Illinois conceived the import of the Emergency Price Control Ac to be such as to assert congressional occupation of the fiel of price fixing in general, but to allow state and federa regulatory commissions to retain their ordinary jurisdic tion over public utility rates, subject to the condition, whic condition has the force of a jurisdictional prerequisite, tha the Price Administrator be given *timely* notice of an in tention to increase public utility rates and that the utilitie consent to his *timely* intervention. It was further indi cated that in our view, which view differs from that of th Supreme Court of Illinois and of appellees, the Illinoi Commission as a result of this federal act, had at least th right, which it claimed, if not, indeed, the absolute duty to ascertain, by matter apparent of record before th Commission and not otherwise, that a utility seeking price increase had complied with this condition prerequisit to the Commission's jurisdiction.

Appellees dispute this construction of the law. We d

not deem this reply to be an appropriate means of debating the merits of the question raised by the conflict between appellants' reading and the Illinois Supreme Court's reading of the act in question. We think it sufficient to say that, upon the question whether the issue is substantial, as distinct from a consideration of the merits of the issue, this case is remarkably like the *Terminal Railroad Association* v. *Brotherhood of Railway Trainmen and Illinois Commerce Commission,* judgment affirmed, 318 U. S. 1, in which a railroad asserted that the Illinois Public Utilities Act, if construed to support an order relative to cabooses in interstate commerce, would bring that act in conflict with the Railway Labor Act, as well as with the Boiler Inspection Act, the Safety Appliance Act and the Interstate Commerce Act. This court regarded these contentions as conferring jurisdiction, though upon the merits the Illinois Supreme Court was affirmed.

But appellees, in addition to disputing appellants' construction of the Emergency Price Control Act, make the further assertion, which is very misleading unless properly understood, that the act was complied with. This contention is subject to two independent replies.

First: It does not appear, either of record in the proceedings before the Illinois Commission or otherwise, nor do appellees contend that they gave the notice in question **prior to the Illinois Commission's order permanently suspending the rates.** Moreover, they make the point, which we deem to verge upon absurdity, that the fact that the Price Administrator did not appear in the proceedings **in the courts on appeal** from the Commission's order is of some significance. Of course, the whole purpose of giving notice is to permit the United States Government, through the Director of Economic Stabilization or the Price Administrator, to present not only argument but **evidence** before the

Illinois Commission. When a record is closed and the evidence is in, there is little point in the United States Government's merely sending a lawyer into a courtroom to make arguments on a record already completed when the Commission will be represented by its own counsel.

If we are correct in our contention that *timely* notice to the United States Government was a prerequisite to the Commission's jurisdiction, it is no answer to say that, after the record was closed, such notice was given. Such notice would not be timely, nor would it subserve the purpose of the act, nor would it amount to compliance with a jurisdictional prerequisite. Summons after judgment, or notice after final decision, when it is too late to offer proof, can hardly be called jurisdictional notification.

Second: Appellees failed to make the fact of notice apparent upon the record of the Commission. It is quite true that the act contains no language requiring the public utility to make such notice apparent. But we apprehend that when a statute requires notice to be given as a prerequisite to the exercise of jurisdiction by a court or other tribunal, such court or other tribunal has at least the right, if not the duty, to take cognizance of a litigant's or a petitioner's failure to make an affirmative showing that jurisdictional prerequisites have been complied with.

One other observation is most important. Appellees make the highly sophistical argument that since the Commission in effect denied the increase, not only for want of jurisdiction but upon the merits, it gave the United States Government every substantial benefit that the Government could have had if it appeared. But appellees also complain of lack of evidence to support the Commission's order. A few words will suffice to convict the appellees of an egregious fallacy and self-contradiction in this position.

Appellees rely upon the Commission's denial of an in-

crease in order to argue that it would have been of no benefit to the Price Administrator to appear in a proceeding in which, even without his appearance, no increase was granted. But at the same time, they complain that the order denying the increase is invalid for lack of evidence. Now, if, as we contend, the purpose of the Emergency Price Control Act was to permit the Director of Economic Stabilization or the Price Administrator not only to appear but to intervene and offer evidence, and if it is likewise true as appellants contend, that no evidence militating against the increase was offered in his absence, then it can not be said that an order which appellees denounce as invalid for lack of evidence protects the federal government's policy, when it might very well have been that the federal government would have offered the very evidence of the absence of which appellees complain if notice had been given.

The simple truth is that appellees deliberately disregarded the command that, before they might increase their fares, they give notice to the United States government of the proceedings. The question whether this failure to give notice vitiated the proceedings is certainly substantial.

We therefore submit that the question whether Emergency Price Control Act justified the Illinois Commission in refusing the increases here involved is substantial and should be passed upon by this court.

Appellees' Fallacies With Respect to the Due Process Question.

Again let us say that we do not conceive it to be the proper office of this reply to debate the merits of the important questions which we seek to present and argue if jurisdiction is void. However, insofar as appellees'

assertions with respect to the due process question are addressed to this court's jurisdiction, as distinct from a consideration of the merits of the due process issue, we consider it proper to make the following brief observations:

In appellants' original statement in support of jurisdiction, it was made clear that we contended that appellees' evidence, although voluminous, was insufficient to support the increase sought in these proceedings because it failed to give the Commission any basis for those findings that appellees in fact sustained any loss or earned less than an adequate return.

We relied upon the principles that both findings and evidence in support of findings of material facts are required by the due process clause.

If appellants are correct in this contention, it would obviously make no difference whether, in writing their order, they indulged in speculation, treated the hearsay literature of economic records as evidence, or otherwise acted improvidently or wrongfully. **The fact would still remain that the carriers had sought an increase in rates without any adequate showing in support of such increase.** In short, the case would be in a posture like that of a case where a trial court has improperly received hearsay evidence for the defendant, misconceived the law, and otherwise erred in denying plaintiff relief but, where, nevertheless, the plaintiff has offered no competent evidence in support of his case. A judgment adverse to the plaintiff in such a case would be affirmed, even though highly improper evidence was received for the defendant.

Appellees advance another sophistry. They argue that the Illinois Commerce Commission has no standing in this court to assail a judgment on the ground that it denies to the public of Illinois due process of law.

Thus there cannot possibly be any merit in appellees' suggestion that the Illinois Commission decided the case on an adequate non-federal ground; for if there was no evidence to justify the increase, the carriers were not entitled to a reversal even though the commission may have erred fundamentally in its rulings and findings. If, as we say, to grant the carriers an increase would deny due process of law when they failed to show any loss, then to reverse an order denying such increase is *per se* unconstitutional no matter how egregious may have been the fallacies embodied in the Commission's orders.

There are two independent answers to this contention. In the *first* place, under both the Illinois and the federal law, the Attorney General (or other counsel for the public) may properly represent the public in a case affecting utilities' rates or services.

In the *second* place, appellees' argument involves the confusion, which is by no means uncommon, between two premises or propositions, one of which premises is unquestionably the law, while the other premise, though frequently asserted, is not and never has been the law.

It is unquestionably the law that only one affected by an unconstitutional statute may challenge its constitutionality. But it is *not* the law, and it never has been the law, that in order to challenge the constitutionality of a statute, the person "affected", if he is in fact "affected", must be the *person whom the unconstitutional features of the statute injure.* If a law or administrative ruling is unconstitutional as a whole, even if it is unconstitutional only because it injures one particular class, then any person, even though he be not a member of that class, may take advantage of the fact that an unconstitutional act is no act at all.

In the instant case, if we are correct in our contention

that the Illinois court required the Illinois Commission to do an unconstitutional act, namely, unconstitutionally injure the public, then certainly the Commission, every member of which is subject to the Constitution of the United States, may invoke the judgment of this court on appeal from such a decision.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellants.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

FILED
JAN 22 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 859

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION

M. L. BELL,
W. F. PETER,
HARRY E. BOE,
MARTIN L. CASSELL, JR.,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Notice as required by the Emergency Price Control Act was in fact given in this particular case	2
The decision of the Supreme Court of Illinois cannot be said to deprive the carrier's passengers of property without due process of law, and presents no substantial federal question in that respect	11
To give this Court jurisdiction, it must appear that there is a federal question which is decisive of the case, etc.	17
Appellant did not exhaust its remedies before the highest state tribunal	19
Conclusion	20

Table of Cases Cited

Banton v. *Belt Line Ry. Corp.*, 268 U. S. 413, 45 Sup. Ct. 534	12,15
Brooks-Sanclon Co. v. *Railroad Commission of Louisiana*, 251 U. S. 396	15
C. M. St. P. & P. Ry. Co. v. *Public Utilities Comm. of Idaho*, 274 U. S. 344	15
Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835	19
Honeyman v. *Hanan*, 300 U. S. 14, 81 L. Ed. 476	18
Lynch v. *New York*, ex rel. Pierson, 293 U. S. 52, 79 L. Ed. 191, 55 Sup. Ct. 16	17
Norfolk & Western Ry. Co. v. *Conley*, 236 U. S. 605, 59 L. Ed. 745	12
Norfolk & Western Ry. Co. v. *West Virginia*, 236 U. S. 605	12,15
Northern Pacific Ry. v. *Department of Public Works of Washington*, 268 U. S. 39	15
Northern Pacific Ry. v. *North Dakota*, 236 U. S. 585	12,15
Mt. Carmel Public Utility and Service Co. v. *Public Utilities Commission*, 297 Ill. 303	12

Pennsylvania R. R. Co. v. *Towers*, 245 U. S. 6.....
People, ex rel. N. Y., N. H. & H. RR. Co. v. *Public Service Commission*, 145 N. Y. S. 503.....
Premier-Pabst Co. v. *Grosscup*, 298 U. S. 226.....
Smyth v. *Ames*, 169 U. S. 466, 42 L. Ed. 819.....
U. S. v. *Cruikshank*, 92 U. S. 542.....
Watson v. *Buck*, 313 U. S. 387, 85 L. Ed. 1416.....

STATUTES CITED

Constitution of the United States, 14th Amendment...
Emergency Price Control Act of 1942 (56 Stat. 765, 50 U. S. C. A. 961).....
Executive Order No. 9250 of October 3, 1942.....
Illinois Public Utilities Act:
Section 67 (Ill. Rev. Stat. 1943, Ch. 111-2/3, par. 71).....
Section 72a (Ch. 111-2/3, Ill. Rev. Stat. 1943)....
Section 76 (Ch. 111-2/3, Ill. Rev. Stat. 1943).....

Page
... 15
blic
... 15
... 13
... 12,15
... 14
... 19
... 17
50
... 2
... 9
/3,
... 10
... 13
... 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 859

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

STATEMENT OF APPELLEES AGAINST THE APPELLANT'S ASSERTED JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellees, Joseph B. Fleming and Aaron Colnon, Trustees of The Chicago, Rock Island and Pacific Railway Company, present this statement to disclose matters and grounds making against the jurisdiction of the Supreme Court of the United States.

I. Notice as Required by the Emergency Price Control Act Was in Fact Given in This Particular Case

On February 5 and 6, 1942, appellees filed four tariffs with the Illinois Commerce Commission specifying increases of approximately 10 per cent in the prevailing intrastate commutation rates of appellees applicable between stations in the Chicago suburban area. These tariffs were filed to become effective on March 8, 1942.

On February 18, 1942, the Commission suspended said tariffs until July 6, 1942. On March 12, 1942, the Commission entered upon a hearing concerning said schedules, and the matter was marked, "heard and taken" on May 15, 1942.

On June 3, 1942, the Commission resuspended these schedules until January 6, 1943.

On October 2, 1942, the amendment to the Emergency Price Control Act of 1942 became effective. (56 Stat. 765, 50 U. S. C. A. Appendix, Sec. 961 *et seq.*)

On November 24, 1942, the Commission entered its order, among other things, permanently suspending said schedules and ordering their cancelation. The findings upon which said order was based were as follows:

> (a) That the Commission has jurisdiction of the subject matter of this cause and of the parties hereto;
>
> (b) That the rates involved herein and in effect on March 7, 1942, are just and reasonable;
>
> (c) That the proposed rates under suspension in this proceeding are unjust and unreasonable and in violation of the Public Utilities Act of Illinois;
>
> (d) That The Chicago, Rock Island and Pacific Railway Company Tariffs, Ill. C. C. Nos. 1002, 1003, 1004, and 1005 are not just and reasonable and should be cancelled, and that the schedule of rates, rules and regulations of the Respondent on file with this Commission and in force and effect on March 7, 1942, should be con-

tinued in effect until the further order of this Commission;

(e) That Respondent, Frank O. Lowden and Joseph B. Fleming, as existing and surviving trustees of the estate of The Chicago, Rock Island and Pacific Railway Company, should publish, post and file with this Commission on not less than one day's notice, effective on or before December 30, 1942, appropriate supplements cancelling The Chicago, Rock Island and Pacific Railway Company Tariffs Ill. C. C. Nos. 1002, 1003, 1004, and 1005, and

(f) That all motions made in this cause by any of the parties hereto that remain undisposed of should be disposed of consistently with the ultimate conclusion contained herein.

Petition for rehearing was filed on December 23, 1942, and denied on January 12, 1943.

The notice required by the Act of October 2, 1942, was in fact given. Such notice is as follows:

"December 22, 1942.

In the matter of the proposed changes in commutation, excursion, or coach fares, stated in Tariffs Ill. C. C. Nos. 1002, 1003, 1004 and 1005, of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees)—Ill. C. C. 30487

Transportation and Public Utilities Division of the Office of Price Administration, Washington, D. C.

GENTLEMEN:

Please be advised that on December 7, 1942, the Illinois Commerce Commission, Springfield, Illinois, served upon Frank O. Lowden and Joseph B. Fleming, surviving Trustees of The Chicago, Rock Island and Pacific Railway Company, its order made and entered on November 24, 1942, finding, among other things,

that the changes in commutation excursion or coach fares stated in Tariffs Ill. C. C. Nos. 1002, 1003, 1004 and 1005, two copies of which are herewith submitted, of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees) should be permanently suspended, cancelled and annulled, said tariffs having been filed to become effective on March 8, 1942, but by action of said Commission having been suspended to January 6, 1943.

Said Frank O. Lowden and Joseph B. Fleming, as surviving Trustees of The Chicago, Rock Island and Pacific Railway Company, maintain that said order of the Illinois Commerce Commission is unlawful, and conformably with the law of the State of Illinois they are filing with said Illinois Commerce Commission their application for rehearing and relief pendente lite, two copies of which application are submitted herewith.

Said Trustees also submit herewith two copies of Exhibit 17 offered by them at the hearing before the Illinois Commerce Commission concerning the tariffs above referred to, which exhibit shows the present fares and fares as proposed by said tariffs. As indicated by this exhibit, the proposal contemplates an increase not in excess of 10% of the prevailing rates.

The undersigned Trustees consent to the intervention by the Transportation and Public Utilities Division of the Office of Price Administration in the above entitled proceeding, but in submitting this notice and so consenting, they do so without prejudice to their right to maintain that neither the Act of October 2, 1942, to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes, nor any regulations, promulgated pursuant thereto, entitle the President, the Transportation and Public Utilities Division of the Office of Price Administration, Washington, D. C., or such other agency as the President may designate, to notice of the pendency

of the above entitled proceedings or of the changes in fares as proposed by the tariffs herewith submitted.

Yours very truly,

FRANK O. LOWDEN and
JOSEPH B. FLEMING,
Trustees of The Chicago, Rock Island and Pacific Railway Company,
By (Signed) HARRY E. BOE,
Their Attorney.

HEB:CK.
Encs."

Acknowledgment of the foregoing notice by the Director of the Transportation and Public Utilities Division, Office of Price Administrator, was made on December 24, 1942, as follows:

"8605-B

OFFICE OF PRICE ADMINISTRATION

Washington, D. C.,
December 24, 1942

Refer to: 383:N:1447

The Chicago, Rock Island and Pacific
Railway Company
LaSalle Street Station
Law Department
Chicago, Illinois

DEAR SIR:

This will acknowledge receipt of your Notice filed with this Office in compliance with the Amendment to the Emergency Price Control Act effective October 2, 1942, Presidential Order No. 9250 and Order No. 1 of the Director of Economic Stabilization, covering changes effected in the following publications:

Supplement No.	*I.C.C. or MF-I.C.C. No.*	*Effective Date*
	1002	
	1003	
	1004	January 6, 1943
	1005	

In future correspondence regarding matter contained in the above publications, kindly refer to the file number shown above.

Yours very truly,

(S) ROBERT A. NIXON,
ROBERT A. NIXON,
Director Transportation and Public Utilities Division."

Following the denial of appellees' petition for rehearing on January 12, 1943, appellees perfected a statutory appeal to the Circuit Court of Cook County, Illinois, on February 8, 1943. Notice of such appeal was forwarded to Utilities Counsel, Legal Division, Office of Price Administration, Washington, D. C., as follows:

"February 13, 1943.

Ill. C. C. 30487

In the matter of the proposed changes in commutation, excursion, or coach fares, stated in Tariffs Ill. C. C. Nos. 1002, 1003, 1004 and 1005, of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees)

Mr. Harry R. Booth,
Utilities Counsel,
Legal Division,
Office of Price Administration,
Washington, D. C.

DEAR MR. BOOTH:

I attach copy of my letter of this date, together with copies of appeal and notice of appeal in the above described proceeding.

This is for your information and file.

Yours very truly,

(Signed) HARRY E. BOE,
General Attorney."

The letter of February 13, 1943, referred to in the foregoing communication is as follows:

"February 13, 1943.

Ill. C. C. 30487

In the matter of the proposed changes in commutation, excursion or coach fares, stated in Tariffs Ill. C. C. Nos. 1002, 1003, 1004, and 1005, of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees)

Hon. Barnet Hodes, Corporation Counsel, City of Chicago, City Hall, Chicago, Illinois.
Hon. George F. Barrett, Attorney General, State of Illinois, 208 South LaSalle Street, Chicago, Illinois.

Mr. Albert E. Clifton, Village Clerk, Village of Midlothian, Midlothian, Illinois.
Mr. Jay W. Bates, 9754 Vanderpoel Avenue, Chicago, Illinois.
Mr. Thomas N. Poynton, Jr., President, Ridge Civic Council, Ridge Park Field House, 96th Street at Longwood Drive, Chicago, Illinois.

GENTLEMEN:

Please be advised that I have today filed with the Clerk of the Circuit Court of Cook County, Illinois, notice of appeal of Frank O. Lowden and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, from order of the Illinois Commerce Commission in the above described proceeding. I enclose herewith a copy of this notice together with copy of notice of appeal filed with the Illinois Commerce Commission.

Yours very truly,

(Signed) HARRY E. BOE,
General Attorney."

And the notice of appeal referred to is as follows:

"STATE OF ILLINOIS,
County of Cook, ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 43-C-1623

FRANK O. LOWDEN and JOSEPH B. FLEMING, Trustees of The Chicago, Rock Island and Pacific Railway Company, *Appellants,*

vs.

ILLINOIS COMMERCE COMMISSION, *Appellee.*

Appeal from order of Illinois Commerce Commission in the matter of the proposed changes in commutation, excursion or coach fares, stated in Tariffs Ill. C. C. Nos. 1002, 1003, 1004 and 1005, of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees), Ill. C. C. Docket No. 30487.

To the Clerk of the Circuit Court of Cook County, Illinois

The undersigned, Frank O. Lowden and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, respondents in the cause above referred to before the Illinois Commerce Commission, Ill. C. C. Docket No. 30487, hereby appeal from the order entered by the Illinois Commerce Commission in said cause on the 24th day of November, 1942, application for rehearing having been denied by said Commission on the 12th day of January, 1943, and herewith file with you as Clerk of the Circuit Court of Cook County, Illinois, a copy of Notice of Appeal to said Court, together with Proof of

Service thereof on the Secretary of the Illinois Commerce Commission.

FRANK O. LOWDEN and JOSEPH B. FLEMING,
Trustees of The Chicago, Rock Island and Pacific Railway Company,
By MARTIN L. CASSELL, JR.,
HARRY E. BOE,
Attorneys for Appellants."

Although the Price Administrator of the Office of Price Administration was notified of the proceedings before the Illinois Commerce Commission and of the appeal to the Circuit Court of Cook County, Illinois, the Price Administrator made no appearance either before the Illinois Commerce Commission or in the Circuit Court. Moreover, contrary to the statement in appellant's Jurisdictional Statement, the Price Administrator did not intervene in the Supreme Court of Illinois, as *amicus curiae,* in the appeal in No. 27894.

The Act of October 2, 1942, provides:

> "* * * *Provided,* that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

Pursuant to Executive Order No. 9250 of October 3, 1942, the Economic Stabilization Director issued an order on or about October 21, 1942, designating the Price Administrator of the Office of Price Administration as the representative of the Director of Economic Stabilization to receive the notices required by the Act of October 2, 1942.

It may be noted that it is not contended in appellant's Jurisdictional Statement that there was any requirement in the Public Utilities Act of Illinois, under which the Illinois Commerce Commission functions, or any rule or regulation effective at the time these proceedings were pending before it, which required that the Illinois Commerce Commission be advised of notices under the Act of October 2, 1942.

In so far as the Act of October 2, 1942, is concerned, the decision of the Supreme Court of Illinois, in construing the Illinois Public Utilities Act, does not present any conflict between the Illinois Public Utilities Act and the Amendment to the Emergency Price Control Act of October 2, 1942. That decision does not draw into question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States. The proposed change in rates was initiated almost eight months before the Act of October 2, 1942, became effective. Hearings before the Illinois Commerce Commission were concluded approximately five months before that Act was approved, and before the statutory procedure was concluded before the Illinois Commerce Commission, the Office of Price Administration (the lawful agency designated to receive the notice) was given full notice of the proceedings. The Office of Price Administration did not take any steps to intervene in the proceedings before the Illinois Commerce Commission. Specific provisions of the Illinois Public Utilities Act empower the Commission at any time to rescind, alter or amend any order made by it. Also, it has the power to grant rehearings. (Illinois Public Utilities Act, Sec. 67, Ill. Rev. Stat. 1943, Ch. 111⅔, Par. 71.)

It is respectfully submitted that the procedure which was followed did not draw into question the validity of a statute of the State of Illinois on the ground of its being

repugnant to the Constitution and laws of the United States.

II. The Decision of the Supreme Court of Illinois Cannot Be Said to Deprive the Carrier's Passengers of Property Without Due Process of Law, and Presents No Substantial Federal Question in That Respect.

As the Supreme Court of Illinois points out in its decision, in each case testimony and exhibits were admitted in evidence showing a substantial deficit in the income from operation of suburban service, and that in no case would the proposed increases in rates be sufficient to overcome the deficit shown. It also points out that there were testimony and exhibits showing the allocation of direct expenses to the suburban service and the apportionment of expenses jointly incurred in that service and the through passenger and freight and express service; that the basis of such allocation and apportionment was given in detail, and that no evidence was offered except that introduced by the carriers.

In its opinion the Supreme Court of Illinois found that the Commission was in error in disregarding the evidence before it and in acting upon its own opinion and conclusions not based upon any evidence in the cases in the matter of allocation of joint expenses to suburban service.

The Court then points out that the Commission, after being furnished with statements of system income showing system increases in revenue in 1942 over 1941, indulged in pure speculation and assumption without any evidence in the record to support its recital that there had probably been a substantial increase in revenue from the suburban service during 1942.

The Court then proceeds to point out that the dominant note of the Commission's approach was to treat the suburban service as more or less of a by-product of railroad

operations as a whole, and that any revenue over out-of-pocket expenses received contributes that much to the financial position of the carrier. The basis for this theory of the Commission, the Court concludes, was contrary to law. In support of that conclusion the Court cited and quoted from *Northern Pacific Railway Company* v. *North Dakota*, 236 U. S. 585, 59 L. Ed. 735; *Norfolk & Western Railway Company* v. *Conley*, 236 U. S. 605, 59 L. Ed. 745; *Banton* v. *Belt Line Railway Corp.*, 268 U. S. 413, 45 Sup. Ct. 534; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819; *Mt. Carmel Public Utility and Service Co.* v. *Public Utilities Commission*, 297 Ill. 303. Portions of those cases quoted by the Supreme Court of Illinois clearly show that said Court considered those cases as authority for the general proposition that a State may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.

The decision of the Supreme Court of Illinois, which did no more than refuse to permit appellant to indulge in speculation and assumption based on system earnings when the evidence before it showed an operating deficit in the suburban service, is given an unusual and specious twist by appellant in claiming that it would have the effect of forcing the Commission to make fiat holdings and thereby deprive the car riders of due process.

There is nothing in the interpretation by the Supreme Court of Illinois of the aforementioned decisions of this Court which is in conflict with what this Court has said therein or in subsequent cases. The most that can be said is that the Supreme Court of Illinois decided that appellant, in its functions under the Illinois Utilities Act, must adhere to the evidence of record rather than to indulge in speculation and assumption based on matters outside the

record or based on matters which relate to system operating results as distinguished from figures relating to the class of service or traffic under consideration which showed a deficit.

In this case, appellant states it is presenting for the first time the contention that where a carrier allegedly fails to present substantial evidence justifying an increase, to set at naught an order denying such an increase is to impose upon the carrier's patrons a confiscatorily high rate. No such claim is made by any person whose property is claimed to be confiscated.

In effect, the contention is that the decision of the Supreme Court of Illinois would permit appellees to increase their rates, as proposed, and would therefore operate to deprive the citizens of Illinois of their property without due process of law in violation of the Constitution of the United States.

In this particular proceeding the Attorney General represents the Illinois Commerce Commission pursuant to statutory authority. Sec. 72a, Ch. 111-2/3, Ill. Rev. Stat. 1943, reads as follows:

> "In all appeals from the orders and decisions from the Commission it shall be the duty of the Attorney General to represent the Commission and defend its orders and decisions."

The Illinois Commerce Commission cannot claim to be the injured party, the contention being for another, i. e., in behalf of the citizens of Illinois. In the case of *Premier-Pabst Co.* v. *Grosscup*, 298 U. S. 226, the Court stated at page 227:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitu-

> tion must show that the alleged unconstitutional feature injures him. * * *"

The citizen would have his remedy at law under the Public Utilities Act. Sec. 76, Ch. 111-2/3, Ill. Rev. Stat. 1943, provides the procedure for obtaining reparation where a public utility charges an excessive or unjustly discriminatory amount for its services, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

The Illinois Commerce Commission is in no position to contend that under the Constitution of the United States property is being taken in violation of the Fourteenth Amendment. That amendment provides:

> "Nor shall any State deprive any person of life, liberty, or property without due process of law."

The Fourteenth Amendment does not apply to the case at bar. The decision of the Supreme Court of Illinois, construing the powers of the Illinois Commerce Commission under the Act pursuant to which it functions, does not operate to deprive any person of his property. The amendment does not affect the rights of one citizen against another, but simply furnishes a guarantee against any encroachment by the State on the fundamental rights which belong to every citizen. *United States* v. *Cruikshank, La.*, 92 U. S. 542, 554, 555.

Appellants' contention of absence of due process is advanced in the face of the fact that the only testimony and exhibits introduced in the proceeding before the Illinois Commerce Commission were those offered by appellees. This evidence showed that appellees operate a suburban service distinct and separate from operations conducted for the transportation of freight and through passengers. Exhibits and testimony were introduced showing the value

of the property and facilities used and useful in the suburban service. These values were based on the original cost of the facilities, except land. The land values used were the appraisals fixed by the Bureau of Valuation of the Interstate Commerce Commission. Appellees offered testimony and exhibits showing the allocation of direct expenses to the suburban service and the apportionment of the expenses jointly incurred in that service and the through passenger and freight and express service. The bases of such allocation and apportionment were given in detail.

By its decision the Supreme Court of Illinois recognized appellees' suburban service as a branch of service separate and distinct from operations conducted for the transportation of freight and through passenger service. This was in keeping with a long line of decisions by the Supreme Court of the United States.

Pennsylvania R. R. Co. v. *Towers*, 245 U. S. 6, 11-12.
People Ex Rel. N. Y., N. H. & H. R. R. Co. v. *Public Service Commission*, 145 N. Y. S. 503, 505.
Norfolk & Western Ry. Co. v. *West Virginia*, 236 U. S. 605, 614.
Northern Pacific Ry. v. *North Dakota*, 236 U. S. 585, 609.
Banton v. *Belt Line Ry.*, 268 U. S. 413, 421, 425;
C. M. & St. P. Ry. Co. v. *Public Utilities Commission of the State of Idaho*, 274 U. S. 344, 350-1;
Smyth v. *Ames*, 169 U. S. 466;
Norfolk & Western Ry. Co. v. *Conley*, 236 U. S. 605;
Northern Pacific Railway v. *Department of Public Works of Washington*, 268 U. S. 39;
Brooks-Scanlon Company v. *Railroad Commission of Louisiana*, 251 U. S. 396.

Appellant does not challenge the fundamental principles announced and followed in the foregoing cases. (Appel-

lant's Jurisdictional Statement, p. 12.) It is the Commission's contention that it cannot determine whether the carrier is in fact sustaining a loss upon commutation service without a perspective of the entire operations and physical economy of appellees. Although now the Commission says it does not challenge these fundamental principles, its decision was substantially premised on a challenge of those principles. (Paragraphs 10 and 13 of Commission's order; abstract 182 to 187, inclusive; and 193 and 194 of abstract in Supreme Court of Illinois.)

Appellant states that it conceives it to be its duty to the public, enjoined upon it by a proper reading of the Constitution of the United States, to prevent unjust discrimination between the various classes of service. The record shows that the Interstate Commerce Commission had already granted a 10 per cent increase, not only as to interstate passenger traffic, but also as to intrastate non-commutation passenger service over which the Interstate Commerce Commission assumed jurisdiction under the 13th Section of the Interstate Commerce Act. Consequently, appellant was without authority to raise or lower those rates covered by the Interstate Commerce Commission's action to remove discrimination even had such discrimination existed. As a matter of fact, this was not a rate discrimination case involving alleged discrimination between commutation rates, as such, compared with interstate and intrastate non-commutation rates, but was an effort on the part of appellees to obtain an increase on a class of transportation which was being conducted at an operating deficit. Neither appellant nor anyone else introduced any evidence in the case to rebut the showing made by appellees as to the operating deficit in their suburban operations. Instead, as the Supreme Court of Illinois points out, appellant sought to offset the evidence introduced by indulging in speculations and assumptions unsupported by evidence.

It cannot, therefore, be said that the decision of the Supreme Court of Illinois had the effect of depriving anyone of his property without due process guaranteed by the Fourteenth Amendment of the Constitution of the United States, and the contention of appellant that a substantial Federal question is involved cannot, it is respectfully submitted, be sustained; nor has the Supreme Court of Illinois decided a Federal question in conflict with this Court's decisions.

III. To Give This Court Jurisdiction, It Must Appear That There Is a Federal Question Which Is Decisive of the Case. If the Decision of the State Court Rests Upon a Non-Federal Ground, Which Independently and Adequately Supports the State Court's Judgment, This Court Will Not Exercise Jurisdiction.

In *Lynch* v. *New York, ex rel. Pierson,* 293 U. S. 52, 79, L. Ed. 191, 55, Sup. Ct. 16, this Court held that where the judgment of the State Court rests on two grounds, one involving a Federal question, the other not, or it does not appear upon which of the two grounds the judgment was based, and the ground independent of the Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. In the cited case, the court stated:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard,* 127 U. S. 216, 234; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 295, 297;

Eustis v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'N* 275 U. S. 212, 214. Where the judgment of the st court rests on two grounds, one involving a fede question and the other not, or if it does not appear up which of two grounds the judgment was based, and ground independent of a federal question is sufficient itself to sustain it, this Court will not take jurisd tion. *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 1 *Johnson* v. *Risk*, *supra*; *Wood Mowing & Reaping M chine Co.* v. *Skinner*, *supra*; *Consolidated Turnpike* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 5 *Cuyahoga River Power Co.* v. *Northern Realty Co.*, U. S. 300, 302, 304."

To the same effect is *Honeyman* v. *Hanan*, 300 U. S. 81 L. Ed. 476.

The court's attention is directed to that part of the opini of the Supreme Court of Illinois reading as follows:

"The orders cannot be sustained for the furth reason that they contain no proper and essential fi ings. Section 65 of the Public Utilities Act (Ill. R Stat. 1943, Chap. 111 ⅔ par. 69), provides that the co mission shall make and render findings concerning t subject matter and facts inquired into, and enter its der based thereon. In *Chicago Railways Co.* v. *Co merce Com. ex rel. Chicago Motor Coach Co.*, 336 51, we said: 'Section 65 of the Commerce Commissi act requires the commission to make and enter findin concerning the subject matter of facts inquired into a enter its order based thereon. Such findings must specific enough to enable the court to review intel gently the decision of the commission and ascertain the facts on which the commission has based its ord afford a reasonable basis for it.' "

* * * * * * *

"The orders in the four cases here under consider tion do not comply with the mandatory requirements section 65 of the Public Utilities Act. They do not c

tain any findings as required by that section. Said orders are void for the further reason that they are not based upon the evidence and are predicated upon matters wholly outside the evidence offered before the commission. They are in form merely arguments and conclusions based upon assumptions and speculations and are not supported by the evidence in the records. The orders are arbitrary, unreasonable and unlawful, and cannot be sustained."

It is, therefore, clear that appellant, the Illinois Commerce Commission, which is a creature of the Illinois legislature, must, according to the highest court in the State, comply with the mandatory provisions of the act under which it is created, and that the action of the Supreme Court of Illinois in interpreting that portion of the State statutes contains no Federal question and is sufficient in itself to sustain the decision of said State court. That court's decision rests upon procedural and substantive matters sufficient in themselves to sustain the decision, irrespective of the Federal questions sought to be presented, and the construction of the State statute by the Supreme Court of Illinois is final and not subject to review. *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 81 L. Ed. 835; *Watson* v. *Buck,* 313 U. S. 387, 85 L. Ed. 1416.

IV. Appellant Did Not Exhaust Its Remedies Before the Highest State Tribunal

Although Rule 44 of the Supreme Court of Illinois provides for rehearings, appellant elected, as it admits in its Jurisdictional Statement, to accept the decision of the Supreme Court of Illinois as final without asking for a rehearing and it did not ask for a rehearing.

Conclusion

For the reasons herein stated it is submitted that an appeal does not lie from said decision of the Supreme Court of Illinois to this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 860

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION,
Appellee.

APPEAL FROM SUPREME COURT OF ILLINOIS, No. 27895.

APPELLANT'S REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

GEORGE F. BARRETT,
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THE DONNELLEY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 860

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION,
Appellee.

APPEAL FROM SUPREME COURT OF ILLINOIS, No. 27895.

APPELLANT'S REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

The appellee or appellees in each of the five cases, respectively, now docketed in this court under Nos. 858 to 862, inclusive, the titles of such cases being set forth in the margin,* have filed statements in opposition to this court's

* No. 858—*Illinois Commerce Commission, et al. v. Illinois Central Railroad Co.*
No. 859—*Illinois Commerce Commission v. Joseph B. Fleming and Aaron Colnon, trustee of Chicago, Rock Island and Pacific Rwy. Co.*
No. 860—*Illinois Commerce Commission v. Chicago, Burlington & Quincy Railroad Co.*
No. 861—*Illinois Commerce Commission v. Henry A. Scandrett, et al., trustees of property of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*
No. 862—*Illinois Commerce Commission v. A. A. Sprague and Bernard J. Fallon, as receivers of Chicago North Shore and Milwaukee Railroad Co.*

jurisdiction. Since these statements, although cast in slightly variant form, all suggest substantially similar arguments, this reply, though copies of it will be printed and filed under each of the five numbers and titles, respectively, will be identical in all of the five cases.

Appellees' suggestions in opposition to this court's jurisdiction are premised upon certain basic fallacies and reflect serious misconceptions of appellants' contentions. In our earnest view, these fallacies and misconceptions can be briefly pointed out.

The Issues Raised by the Emergency Price Control Act.

In appellants' original statement in support of jurisdiction, it was clearly indicated that the Illinois Commerce Commission and the Attorney General of Illinois, differing with appellees and with the Supreme Court of Illinois, conceived the import of the Emergency Price Control Act to be such as to assert congressional occupation of the field of price fixing in general, but to allow state and federal regulatory commissions to retain their ordinary jurisdiction over public utility rates, subject to the condition, which condition has the force of a jurisdictional prerequisite, that the Price Administrator be given *timely* notice of an intention to increase public utility rates and that the utilities consent to his *timely* intervention. It was further indicated that in our view, which view differs from that of the Supreme Court of Illinois and of appellees, the Illinois Commission as a result of this federal act, had at least the right, which it claimed, if not, indeed, the absolute duty, to ascertain, by matter apparent of record before the Commission and not otherwise, that a utility seeking a price increase had complied with this condition prerequisite to the Commission's jurisdiction.

Appellees dispute this construction of the law. We do

not deem this reply to be an appropriate means of debating the merits of the question raised by the conflict between appellants' reading and the Illinois Supreme Court's reading of the act in question. We think it sufficient to say that, upon the question whether the issue is substantial, as distinct from a consideration of the merits of the issue, this case is remarkably like the *Terminal Railroad Association* v. *Brotherhood of Railway Trainmen and Illinois Commerce Commission*, judgment affirmed, 318 U. S. 1, in which a railroad asserted that the Illinois Public Utilities Act, if construed to support an order relative to cabooses in interstate commerce, would bring that act in conflict with the Railway Labor Act, as well as with the Boiler Inspection Act, the Safety Appliance Act and the Interstate Commerce Act. This court regarded these contentions as conferring jurisdiction, though upon the merits the Illinois Supreme Court was affirmed.

But appellees, in addition to disputing appellants' construction of the Emergency Price Control Act, make the further assertion, which is very misleading unless properly understood, that the act was complied with. This contention is subject to two independent replies.

First: It does not appear, either of record in the proceedings before the Illinois Commission or otherwise, nor do appellees contend that they gave the notice in question **prior to the Illinois Commission's order permanently suspending the rates**. Moreover, they make the point, which we deem to verge upon absurdity, that the fact that the Price Administrator did not appear in the proceedings **in the courts on appeal** from the Commission's order is of some significance. Of course, the whole purpose of giving notice is to permit the United States Government, through the Director of Economic Stabilization or the Price Administrator, to present not only argument but **evidence** before the

Illinois Commission. When a record is closed and the evidence is in, there is little point in the United States Government's merely sending a lawyer into a courtroom to make arguments on a record already completed when the Commission will be represented by its own counsel.

If we are correct in our contention that *timely* notice to the United States Government was a prerequisite to the Commission's jurisdiction, it is no answer to say that, after the record was closed, such notice was given. Such notice would not be timely, nor would it subserve the purpose of the act, nor would it amount to compliance with a jurisdictional prerequisite. Summons after judgment, or notice after final decision, when it is too late to offer proof, can hardly be called jurisdictional notification.

Second: Appellees failed to make the fact of notice apparent upon the record of the Commission. It is quite true that the act contains no language requiring the public utility to make such notice apparent. But we apprehend that when a statute requires notice to be given as a prerequisite to the exercise of jurisdiction by a court or other tribunal, such court or other tribunal has at least the right, if not the duty, to take cognizance of a litigant's or a petitioner's failure to make an affirmative showing that jurisdictional prerequisites have been complied with.

One other observation is most important. Appellees make the highly sophistical argument that since the Commission in effect denied the increase, not only for want of jurisdiction but upon the merits, it gave the United States Government every substantial benefit that the Government could have had if it appeared. But appellees also complain of lack of evidence to support the Commission's order. A few words will suffice to convict the appellees of an egregious fallacy and self-contradiction in this position.

Appellees rely upon the Commission's denial of an in-

crease in order to argue that it would have been of no benefit to the Price Administrator to appear in a proceeding in which, even without his appearance, no increase was granted. But at the same time, they complain that the order denying the increase is invalid for lack of evidence. Now, if, as we contend, the purpose of the Emergency Price Control Act was to permit the Director of Economic Stabilization or the Price Administrator not only to appear but to intervene and offer evidence, and if it is likewise true as appellants contend, that no evidence militating against the increase was offered in his absence, then it can not be said that an order which appellees denounce as invalid for lack of evidence protects the federal government's policy, when it might very well have been that the federal government would have offered the very evidence of the absence of which appellees complain if notice had been given.

The simple truth is that appellees deliberately disregarded the command that, before they might increase their fares, they give notice to the United States government of the proceedings. The question whether this failure to give notice vitiated the proceedings is certainly substantial.

We therefore submit that the question whether Emergency Price Control Act justified the Illinois Commission in refusing the increases here involved is substantial and should be passed upon by this court.

Appellees' Fallacies With Respect to the Due Process Question.

Again let us say that we do not conceive it to be the proper office of this reply to debate the merits of the important questions which we seek to present and argue if jurisdiction is void. However, insofar as appellees'

assertions with respect to the due process question are addressed to this court's jurisdiction, as distinct from a consideration of the merits of the due process issue, we consider it proper to make the following brief observations:

In appellants' original statement in support of jurisdiction, it was made clear that we contended that appellees' evidence, although voluminous, was insufficient to support the increase sought in these proceedings because it failed to give the Commission any basis for those findings that appellees in fact sustained any loss or earned less than an adequate return.

We relied upon the principles that both findings and evidence in support of findings of material facts are required by the due process clause.

If appellants are correct in this contention, it would obviously make no difference whether, in writing their order, they indulged in speculation, treated the hearsay literature of economic records as evidence, or otherwise acted improvidently or wrongfully. **The fact would still remain that the carriers had sought an increase in rates without any adequate showing in support of such increase.** In short, the case would be in a posture like that of a case where a trial court has improperly received hearsay evidence for the defendant, misconceived the law, and otherwise erred in denying plaintiff relief but, where, nevertheless, the plaintiff has offered no competent evidence in support of his case. A judgment adverse to the plaintiff in such a case would be affirmed, even though highly improper evidence was received for the defendant.

Appellees advance another sophistry. They argue that the Illinois Commerce Commission has no standing in this court to assail a judgment on the ground that it denies to the public of Illinois due process of law.

Thus there cannot possibly be any merit in appellees' suggestion that the Illinois Commission decided the case on an adequate non-federal ground; for if there was no evidence to justify the increase, the carriers were not entitled to a reversal even though the commission may have erred fundamentally in its rulings and findings. If, as we say, to grant the carriers an increase would deny due process of law when they failed to show any loss, then to reverse an order denying such increase is *per se* unconstitutional no matter how egregious may have been the fallacies embodied in the Commission's orders.

There are two independent answers to this contention. In the *first* place, under both the Illinois and the federal law, the Attorney General (or other counsel for the public) may properly represent the public in a case affecting utilities' rates or services.

In the *second* place, appellees' argument involves the confusion, which is by no means uncommon, between two premises or propositions, one of which premises is unquestionably the law, while the other premise, though frequently asserted, is not and never has been the law.

It is unquestionably the law that only one affected by an unconstitutional statute may challenge its constitutionality. But it is *not* the law, and it never has been the law, that in order to challenge the constitutionality of a statute, the person "affected", if he is in fact "affected", must be the *person whom the unconstitutional features of the statute injure.* If a law or administrative ruling is unconstitutional as a whole, even if it is unconstitutional only because it injures one particular class, then any person, even though he be not a member of that class, may take advantage of the fact that an unconstitutional act is no act at all.

In the instant case, if we are correct in our contention

that the Illinois court required the Illinois Commission to do an unconstitutional act, namely, unconstitutionally injure the public, then certainly the Commission, every member of which is subject to the Constitution of the United States, may invoke the judgment of this court on appeal from such a decision.

Respectfully submitted,

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JAN 22 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 860

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION

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INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Decision of Supreme Court of Illinois did not subordinate any law of the United States to the Illinois Public Utilities Act	1
The decision of the Supreme Court of Illinois did not deprive the citizens of Illinois of their property without due process of law	4
The decision of the Supreme Court of Illinois rests upon adequate non-federal grounds	6
Conclusion	7

Table of Cases Cited

Braxton County Court v. *West Virginia*, 208 U. S. 192	5
Endicott-Johnson Corp. v. *Encyclopedia Press*, 266 U. S. 285	5
Lynch v. *New York*, ex rel. Pierson, 293 U. S. 52	6
Tyler v. *Judges of Court of Registration*, 179 U. S. 405	5
Vinson v. *Washington Gas Light Co.*, 321 U. S. 489	3,4

Statutes Cited

Emergency Price Control Act	2
Illinois Public Utilities Act (Section 76, Chapter 111-2/3, Illinois Revised Statutes, 1943)	5
Illinois Revised Statutes, 1943, Chapter 111-2/3 Section 72a	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 860

ILLINOIS COMMERCE COMMISSION,

Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellee

STATEMENT OF APPELLEE MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ASSERTED BY APPELLANT.

Appellee, Chicago, Burlington & Quincy Railroad Company, presents this statement disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States pursuant to paragraph 3 of Rule 12 of this Court.

I

Decision of Supreme Court of Illinois Did Not Subordinate Any Law of the United States to the Illinois Public Utilities Act.

Any consideration of appellant's attempt to invoke the jurisdiction of this Court based upon the assertion that the Illinois Public Utilities Act as construed and interpreted

by the Supreme Court of Illinois is repugnant to the Emergency Price Control Act, requires a brief review of the facts in order that the case may be viewed in its proper perspective.

By appropriate tariffs filed with the Illinois Commerce Commission in February, 1942, to become effective in March 1942, appellee proposed to increase by ten per cent its intrastate commutation passenger fares applicable between Chicago and Aurora, Illinois. This increase in commutation fares was proposed in order to conform with the same relative increase in one-way and round-trip fares being made effective at the same time under authority of an order issued by the Interstate Commerce Commission in its docket *Ex Parte No. 148*. The Illinois Commerce Commission suspended the proposed commutation fares and ordered an investigation instituted to determine the propriety of the new fares. The investigation was concluded and the case taken under advisement by the Commission in *June, 1942*. In *December, 1942* appellee was served with an order of the Commission finding that the proposed fares were unreasonable and ordering the tariffs cancelled. Appellee complied with that order. In the meantime, on *October 2, 1942*, the amendment to the Emergency Price Control Act referred to by appellant in its jurisdictional statement, was passed. In *January, 1943*, appellee applied to the Commission for a rehearing and at the same time served notice upon the Price Administrator, which notice contained a consent to his intervention in the proceedings in compliance with the requirements of the Emergency Price Control Act. The petition for rehearing was denied and, in apt time, appellee filed its appeal in the Circuit Court of Cook County, Illinois. At that time the Price Administrator was again notified of the pendency of the proceeding and the second notice also contained appellee's consent to his

intervention. At no time did the Price Administrator intervene, or seek to intervene, in the proceedings. Appellant's assertion in its jurisdictional statement that the Price Administrator sought to intervene in the Supreme Court of Illinois as *amicus curiae*, is a misstatement—probably made through inadvertence. The Price Administrator has never sought to intervene in this case either as *amicus curiae* or in any other capacity.

Appellant's claim to jurisdiction appears to be based principally upon the fact that it was not "made to appear of record" that appellee had served the required notice upon the Price Administrator. The simple answer is that the record in this proceeding was closed four months before the Act requiring such notice was passed. But whether or not the Illinois Commerce Commission was entitled to receive a copy of the notice served upon the Price Administrator does not present a substantial Federal question.

It is important to note that the order of the Commission which was the subject matter of the appeal to the Supreme Court of Illinois did not raise any question of the effect of the Price Control Act upon the jurisdiction of the Commission. That question was raised for the first time in appellant's brief in the Supreme Court.

The contention that there is a question of whether the Price Control Act deprived the Illinois Commerce Commission of jurisdiction to permit the increases in rates proposed by appellee is without merit. That Act did not have the effect of nullifying established procedure under the Illinois Public Utilities Act. The Supreme Court of Illinois held that the Price Control Act did not affect the jurisdiction of the Illinois Commerce Commission and this holding was based, as indicated in the opinion, upon the decision of this Court in *Vinson* v. *Washington Gas Light Co.*, 321

U. S. 489. In that case, in speaking of the effect of the Price Control Act upon the jurisdiction of regulatory commissions, this Court said (page 499):

> "We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra,* as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers. This we are unable to do."

Thus, even if it could be said that any Federal question has been raised in this proceeding on that point such question has already been decided by this Court. As a consequence there is no basis for the claim that the Illinois Public Utilities Act is repugnant to any law of the United States.

II

The Decision of the Supreme Court of Illinois Does Not Deprive the Citizens of Illinois of Their Property Without Due Process of Law.

In effect, appellant's contention is that the Supreme Court of Illinois, by permitting the increase in rates, is depriving the citizens of Illinois of their property without due process of law in violation of the Constitution of the United States. This contention borders on the frivolous. As the Supreme Court of Illinois pointed out in its opinion, appellee is not seeking a return on any investment. It is merely seeking an increase in fares in order to reduce operating deficits on a particular class of traffic. Substantial evidence was introduced by appellee showing the losses sustained in transporting suburban passenger traffic.

No one appeared in opposition to the proposed fares except the Attorney General but, in this particular proceeding, he does not represent the citizens of Illinois. He represents the Illinois Commerce Commission pursuant to statutory authorization. Section 72a, Chapter 111-⅔, Illinois Revised Statutes, 1943, reads as follows:

> "In all appeals from the orders and decisions of the Commission, it shall be the duty of the Attorney General to represent the Commission and defend its orders and decisions."

The Illinois Commerce Commission is in no position to contend that under the Constitution of the United States the property of some unknown person or persons is being taken without due process. The only one who can raise that point is some person who might be directly affected. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405; *Braxton County Court* v. *West Virginia*, 208 U. S. 192.

Any citizen who feels he has been injured by the payment of an excessive rate has a complete remedy under the Illinois Public Utilities Act. Section 76, Chapter 111-⅔, Illinois Revised Statutes, 1943, provides the procedure for obtaining reparation in the case where a public utility charges an excessive or unjustly discriminatory amount for its services, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

The proceedings under which appellee would put the increased fares into effect are in accordance with those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. When proceedings are conducted in accordance with those rules and principles, as this one was, then due process has been observed. *Endicott-Johnson Corp.* v. *Encyclopedia Press*, 266 U. S. 285, 288.

III

The Decision of the Supreme Court of Illinois Rests Upon Adequate Non-Federal Grounds

The principal grounds upon which the Supreme Court of Illinois set aside the order of the Illinois Commerce Commission will be found in that portion of its opinion reading as follows:

> "The orders in the four cases here under consideration do not comply with the mandatory requirements of section 65 of the Public Utilities Act. They do not contain any findings as required by that section. Said orders are void for the further reason that they are not based upon the evidence and are predicated upon matters wholly outside the evidence offered before the commission. They are in form merely arguments and conclusions based upon assumptions and speculations and are not supported by the evidence in the records. The orders are arbitrary, unreasonable and unlawful, and cannot be sustained."

The Illinois Commerce Commission was created by and receives its authority from the Illinois Public Utilities Act and in all its actions it must comply with the mandatory provisions of that Act. In applying that statute to the order of the Commission under consideration the Supreme Court of Illinois found that the Commission had exceeded its authority and that its order was void. That action of the Supreme Court of Illinois involved no Federal question and constitutes sufficient grounds for this Court to decline to assume jurisdiction.

In *Lynch* v. *New York, ex rel., Pierson,* 293 U. S. 52, this Court held that where the judgment of the State court rests on two grounds, one involving a Federal question, the other not, and the ground independent of the Federal question is

sufficient in itself to sustain it, this Court will not take jurisdiction.

The decision of the Supreme Court of Illinois rests upon grounds other than those involving a Federal question and they are sufficient in themselves to sustain it.

Conclusion

For the reasons herein stated it is respectfully submitted that an appeal does not lie from the decision of the Supreme Court of Illinois to this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 861

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS. No. 27896.

APPELLANT'S REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellant.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

THE DUNHAM-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

IN THE

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The appellee or appellees in each of the five cases, respectively, now docketed in this court under Nos. 858 to 862, inclusive, the titles of such cases being set forth in the margin,* have filed statements in opposition to this court's

* No. 858—*Illinois Commerce Commission, et al. v. Illinois Central Railroad Co.*

No. 859—*Illinois Commerce Commission v. Joseph B. Fleming and Aaron Colnon, trustee of Chicago, Rock Island and Pacific Rwy. Co.*

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No. 861—*Illinois Commerce Commission v. Henry A. Scandrett, et al., trustees of property of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*

No. 862—*Illinois Commerce Commission v. A. A. Sprague and Bernard J. Fallon, as receivers of Chicago North Shore and Milwaukee Railroad Co.*

jurisdiction. Since these statements, although cast in slightly variant form, all suggest substantially similar arguments, this reply, though copies of it will be printed and filed under each of the five numbers and titles, respectively, will be identical in all of the five cases.

Appellees' suggestions in opposition to this court's jurisdiction are premised upon certain basic fallacies and reflect serious misconceptions of appellants' contentions. In our earnest view, these fallacies and misconceptions can be briefly pointed out.

The Issues Raised by the Emergency Price Control Act.

In appellants' original statement in support of jurisdiction, it was clearly indicated that the Illinois Commerce Commission and the Attorney General of Illinois, differing with appellees and with the Supreme Court of Illinois, conceived the import of the Emergency Price Control Act to be such as to assert congressional occupation of the field of price fixing in general, but to allow state and federal regulatory commissions to retain their ordinary jurisdiction over public utility rates, subject to the condition, which condition has the force of a jurisdictional prerequisite, that the Price Administrator be given *timely* notice of an intention to increase public utility rates and that the utilities consent to his *timely* intervention. It was further indicated that in our view, which view differs from that of the Supreme Court of Illinois and of appellees, the Illinois Commission as a result of this federal act, had at least the right, which it claimed, if not, indeed, the absolute duty, to ascertain, by matter apparent of record before the Commission and not otherwise, that a utility seeking a price increase had complied with this condition prerequisite to the Commission's jurisdiction.

Appellees dispute this construction of the law. We do

not deem this reply to be an appropriate means of debating the merits of the question raised by the conflict between appellants' reading and the Illinois Supreme Court's reading of the act in question. We think it sufficient to say that, upon the question whether the issue is substantial, as distinct from a consideration of the merits of the issue, this case is remarkably like the *Terminal Railroad Association* v. *Brotherhood of Railway Trainmen and Illinois Commerce Commission*, judgment affirmed, 318 U. S. 1, in which a railroad asserted that the Illinois Public Utilities Act, if construed to support an order relative to cabooses in interstate commerce, would bring that act in conflict with the Railway Labor Act, as well as with the Boiler Inspection Act, the Safety Appliance Act and the Interstate Commerce Act. This court regarded these contentions as conferring jurisdiction, though upon the merits the Illinois Supreme Court was affirmed.

But appellees, in addition to disputing appellants' construction of the Emergency Price Control Act, make the further assertion, which is very misleading unless properly understood, that the act was complied with. This contention is subject to two independent replies.

First: It does not appear, either of record in the proceedings before the Illinois Commission or otherwise, nor do appellees contend that they gave the notice in question **prior to the Illinois Commission's order permanently suspending the rates.** Moreover, they make the point, which we deem to verge upon absurdity, that the fact that the Price Administrator did not appear in the proceedings **in the courts on appeal** from the Commission's order is of some significance. Of course, the whole purpose of giving notice is to permit the United States Government, through the Director of Economic Stabilization or the Price Administrator, to present not only argument but **evidence** before the

Illinois Commission. When a record is closed and the evidence is in, there is little point in the United States Government's merely sending a lawyer into a courtroom to make arguments on a record already completed when the Commission will be represented by its own counsel.

If we are correct in our contention that *timely* notice to the United States Government was a prerequisite to the Commission's jurisdiction, it is no answer to say that, after the record was closed, such notice was given. Such notice would not be timely, nor would it subserve the purpose of the act, nor would it amount to compliance with a jurisdictional prerequisite. Summons after judgment, or notice after final decision, when it is too late to offer proof, can hardly be called jurisdictional notification.

Second: Appellees failed to make the fact of notice apparent upon the record of the Commission. It is quite true that the act contains no language requiring the public utility to make such notice apparent. But we apprehend that when a statute requires notice to be given as a prerequisite to the exercise of jurisdiction by a court or other tribunal, such court or other tribunal has at least the right, if not the duty, to take cognizance of a litigant's or a petitioner's failure to make an affirmative showing that jurisdictional prerequisites have been complied with.

One other observation is most important. Appellees make the highly sophistical argument that since the Commission in effect denied the increase, not only for want of jurisdiction but upon the merits, it gave the United States Government every substantial benefit that the Government could have had if it appeared. But appellees also complain of lack of evidence to support the Commission's order. A few words will suffice to convict the appellees of an egregious fallacy and self-contradiction in this position.

Appellees rely upon the Commission's denial of an in-

crease in order to argue that it would have been of no benefit to the Price Administrator to appear in a proceeding in which, even without his appearance, no increase was granted. But at the same time, they complain that the order denying the increase is invalid for lack of evidence. Now, if, as we contend, the purpose of the Emergency Price Control Act was to permit the Director of Economic Stabilization or the Price Administrator not only to appear but to intervene and offer evidence, and if it is likewise true as appellants contend, that no evidence militating against the increase was offered in his absence, then it can not be said that an order which appellees denounce as invalid for lack of evidence protects the federal government's policy, when it might very well have been that the federal government would have offered the very evidence of the absence of which appellees complain if notice had been given.

The simple truth is that appellees deliberately disregarded the command that, before they might increase their fares, they give notice to the United States government of the proceedings. The question whether this failure to give notice vitiated the proceedings is certainly substantial.

We therefore submit that the question whether Emergency Price Control Act justified the Illinois Commission in refusing the increases here involved is substantial and should be passed upon by this court.

Appellees' Fallacies With Respect to the Due Process Question.

Again let us say that we do not conceive it to be the proper office of this reply to debate the merits of the important questions which we seek to present and argue if jurisdiction is void. However, insofar as appellees'

assertions with respect to the due process question are addressed to this court's jurisdiction, as distinct from a consideration of the merits of the due process issue, we consider it proper to make the following brief observations:

In appellants' original statement in support of jurisdiction, it was made clear that we contended that appellees' evidence, although voluminous, was insufficient to support the increase sought in these proceedings because it failed to give the Commission any basis for those findings that appellees in fact sustained any loss or earned less than an adequate return.

We relied upon the principles that both findings and evidence in support of findings of material facts are required by the due process clause.

If appellants are correct in this contention, it would obviously make no difference whether, in writing their order, they indulged in speculation, treated the hearsay literature of economic records as evidence, or otherwise acted improvidently or wrongfully. **The fact would still remain that the carriers had sought an increase in rates without any adequate showing in support of such increase.** In short, the case would be in a posture like that of a case where a trial court has improperly received hearsay evidence for the defendant, misconceived the law, and otherwise erred in denying plaintiff relief but, where, nevertheless, the plaintiff has offered no competent evidence in support of his case. A judgment adverse to the plaintiff in such a case would be affirmed, even though highly improper evidence was received for the defendant.

Appellees advance another sophistry. They argue that the Illinois Commerce Commission has no standing in this court to assail a judgment on the ground that it denies to the public of Illinois due process of law.

Thus there cannot possibly be any merit in appellees' suggestion that the Illinois Commission decided the case on an adequate non-federal ground; for if there was no evidence to justify the increase, the carriers were not entitled to a reversal even though the commission may have erred fundamentally in its rulings and findings. If, as we say, to grant the carriers an increase would deny due process of law when they failed to show any loss, then to reverse an order denying such increase is *per se* unconstitutional no matter how egregious may have been the fallacies embodied in the Commission's orders.

There are two independent answers to this contention. In the *first* place, under both the Illinois and the federal law, the Attorney General (or other counsel for the public) may properly represent the public in a case affecting utilities' rates or services.

In the *second* place, appellees' argument involves the confusion, which is by no means uncommon, between two premises or propositions, one of which premises is unquestionably the law, while the other premise, though frequently asserted, is not and never has been the law.

It is unquestionably the law that only one affected by an unconstitutional statute may challenge its constitutionality. But it is *not* the law, and it never has been the law, that in order to challenge the constitutionality of a statute, the person "affected", if he is in fact "affected", must be the *person whom the unconstitutional features of the statute injure.* If a law or administrative ruling is unconstitutional as a whole, even if it is unconstitutional only because it injures one particular class, then any person, even though he be not a member of that class, may take advantage of the fact that an unconstitutional act is no act at all.

In the instant case, if we are correct in our contention

that the Illinois court required the Illinois Commission to do an unconstitutional act, namely, unconstitutionally injure the public, then certainly the Commission, every member of which is subject to the Constitution of the United States, may invoke the judgment of this court on appeal from such a decision.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellants.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 861

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION

CARSON L. TAYLOR,
LARRY H. DUGAN,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Preliminary statement	3
The Illinois Public Utilities Act is not in conflict with the provisions of the Emergency Price Control Act of 1942	5
The Illinois Public Utilities Act as construed by the Supreme Court of Illinois is not repugnant to the Fourteenth Amendment to the Constitution and does not deprive patrons of the railroad of their property without due process of law	8
Conclusion	11

Table of Cases Cited

Columbus & G. Ry. Co. v. *Miller*, 283 U. S. 96	10
Smith v. *Indiana*, 191 U. S. 138	9
Utah Power & Light Co. v. *Pfrost*, 286 U. S. 165	11
Vinson v. *Washington Gas Light Co.*, 321 U. S. 489	8

Statutes Cited

Constitution of the United States, 14th Amendment	8
Emergency Price Control Act	4,5,6
Illinois Public Utilities Act	4,5,6
Judicial Code, Section 237 (28 U S. C. A. 344)	2,3,11

THE

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Appellees

APPEAL FROM SUPREME COURT OF ILLINOIS.

STATEMENT IN OPPOSITION TO JURISDICTIONAL STATEMENT OF APPELLANT

Come now the appellees in the above entitled cause, by their counsel of record, and, pursuant to Rule 12 (3) of the Rules of this Court, present this statement in opposition to appellant's assertion that the instant case presents a jurisdictional question to this Court. In support thereof appellees respectfully state:

I

The final judgment and decision of the Supreme Court of Illinois does not draw into question the validity of a treaty or statute of the United States and there is, therefore, no decision against the validity of such treaty or statute.

II

Contrary to the assertion of appellant, the case does not draw into question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

III

The case presents no substantial Federal question.

The confusing and involved jurisdictional statement of appellant requires careful analysis to determine the questions which appellant claims are involved and which would permit an appeal under Section 237 of the Federal Judicial Code (U. S. Code Ann., Title 28, Sec. 344). If the questions were simply presented, the want of applicability of this statute authorizing an appeal would be readily apparent. Bared of all of the confusing language, we understand the appellant to claim:

1. The Illinois Public Utilities Act is in conflict with the provisions of the Emergency Price Control Act of 1942.

2. The Illinois Public Utilities Act is repugnant to the Fourteenth Amendment to the Constitution in that as construed by the Supreme Court of Illinois it deprives patrons of the railroad of their property, without due process of law.

These points will briefly be dealt with in order to demonstrate that no substantial Federal questions are involved and that nothing is here presented from which an appeal is authorized by the provisions of Section 237 of the Federal Judicial Code (U. S. Code Ann., Title 28, Sec. 344).

Before discussing questions raised by appellant, and so that this Court will understand the nature of the case which the appellant seeks here to have reviewed, we make the following preliminary statement:

Preliminary Statement

The Appellees, Trustees of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, having been so appointed by the United States District Court for the Northern District of Illinois, Eastern Division, in a proceeding entitled "In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, No. 60463", operate a suburban passenger service in the Chicago metropolitan area. This service has been operated at a loss for many years. Effective the 10th day of February, 1942, the appellees increased their single and round-trip suburban fares by ten per cent, which increases are still in effect. By schedules filed with the Illinois Commerce Commission on the 5th day of February, 1942, these appellees proposed increases in their intrastate commutation (multiple-ride) fares applicable within the Chicago area. The latter increases were suspended by the Illinois Commerce Commission until January 6, 1943, and subsequently—on March 23, 24, and June 9, 1942—hearings were held on the reasonableness and lawfulness of the proposed increases in fares. On the last named date, the case was marked "heard and taken". By opinion and order dated November 24, 1942 (served on appellees December 7, 1942), the Illinois Commerce Commission denied these appellees the right to make

the proposed increases, and the schedules proposing said increases were cancelled pursuant to said order. In denying the increases, the Commission, to support its order, made the following findings:

> "(a) that the Commission has jurisdiction of the subject matter of this cause and of the parties hereto;
>
> (b) that the rates involved herein and in effect March 7, 1942 are just and reasonable;
>
> (c) that the proposed rates under suspension in this proceeding are unjust and unreasonable and in violation of the Public Utilities Act of Illinois."

In the interim between the closing of the record in the proceeding and the decision of the Commission denying the proposed increases, the 1942 amendment to the Emergency Price Control Act was passed by Congress, October 2, 1942, which provided that no common carrier should make any general increase in rates without first giving thirty days' notice to the President, or such agency as he might designate, and with consent to the timely intervention of such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. Whether or not a notice of these proposed increases was served on the Office of Price Administration prior to the date of the Commission's report and order is unimportant, wholly immaterial, and raises no legal question in this proceeding, for no increases were authorized but on the contrary, permission to increase the rates was denied by the Commission, for the reasons set forth in the findings above quoted. Had the Office of Price Administration intervened it could not have secured a more favorable result, and the agency was notified, with consent to intervention, of the further efforts of appellees to secure the increases.

Following the denial of the proposed increases by the Illinois Commerce Commission, and within the time re-

quired by the Illinois statutes, appellees filed their petition for rehearing and gave notice to the Office of Price Administration, reciting consent to its intervention. The petition for rehearing was denied and within the time required by the Illinois statutes, appellees appealed to the Circuit Court of Cook County, Illinois, and again gave notice to the Office of Price Administration, with the recital of consent to intervention. The Office of Price Administration did not elect to intervene either in the proceeding before the Commission or on the appeal to the court. At Page 10 of appellant's Jurisdictional Statement, it is stated:

> "In each of these cases, the Price Administrator asked leave to intervene in the Supreme Court of Illinois as *amicus curiae*. In each of these cases the Supreme Court of Illinois denied this leave."

This statement is typical of the loose and inaccurate way appellant has dealt with the facts and the law, in its statement. The Price Administrator made no attempt to intervene in this case before the Illinois Supreme Court as *amicus curiae*, or for any other purpose.

With this brief statement of the facts, we will now briefly discuss the issues as raised by the appellant.

I

The Illinois Public Utilities Act Is Not in Conflict With the Provisions of the Emergency Price Control Act of 1942.

The appellant states that the Illinois Public Utilities Act as construed by the Supreme Court of Illinois is in conflict with the provisions of the Emergency Price Control Act of 1942. The Illinois Public Utilities Act as construed by the Supreme Court of Illinois is the law of Illinois, as all Illinois statutes mean what the Supreme Court of Illinois

says they mean. This Court has always accepted the interpretation which the Supreme Court of the State makes of the State statutes.

In what respect does the appellant claim that the Illinois Public Utilities Act is in conflict with the Emergency Price Control Act of 1942? It is, indeed, difficult to follow the reasoning of the appellant, and the conclusion that a conflict exists is reached by conjuring imaginary situations which have no relation to the facts and legal questions presented in this case. After quoting the provisions of the 1942 amendment to the Emergency Price Control Act, which requires the service of a 30-days' notice before any common carrier shall make any general increase in its rates, the appellant, in its statement, recites that the evidence in the proceeding was submitted to the Illinois Commerce Commission and the record was closed before September 15, 1942 (the record was closed June 9, 1942). It then states that notwithstanding the fact that the applications for increased rates were pending before the Commission at the time the Act in question was passed, none of the railroads *made it appear of record* that they had notified the Price Administrator of their intent and that they consented to his intervention before the Commission.* It is to be noted that the appellant nowhere claims that the Price Administrator was not notified; it only claims that the Illinois Commerce Commission was not notified of the notice to the Price Administrator.

Next, appellant states that the Illinois Commerce Commisssion construed the 1942 amendment to the Emergency Price Control Act as to make the Price Administrator an indispensable party to the proceeding, at least to the extent

---

* The facts were, these appellees twice notified the Price Administrator of their intent and consented to his intervention—once at the time petition for rehearing was filed before the Illinois Commerce Commission, and again when appeal was perfected to the Circuit Court of Illinois at Chicago. On neither occasion did the Price Administrator take any action.

that he must be notified. There is nothing in the Commission's report and order to support this statement. The report and order of the Commission in this case, while noting that the Commission's record did not show whether notice had been served, denied the proposed increases, not because the Commission's record failed to show that the Price Administrator had been notified, but because the existing rates were found to be just and reasonable, and the proposed rates were found to be unjust and unreasonable. The Commission made no finding that the Office of Price Administration was an indispensable party or that its jurisdiction was dependent upon the service of the notice as required by the 1942 amendment to the Emergency Price Control Act. Obviously the Commission could not have reached any result more favorable to the Office of Price Administration had it intervened and opposed the increases, for the increases were denied.

Next it is contended that the Commission had a right to insist that it be notified that the carrier had served the notice required by the 1942 amendment to the Emergency Price Control Act. That question is not present in this case. We do not here question the right of the Illinois Commerce Commission to require by rule that proof of service of the notice required by the Emergency Price Control Act of 1942 be furnished to the Commission. Certainly the Supreme Court of Illinois has not held that the Commission had no right to insist that it be notified of the service of the notice on the Office of Price Administration. The Commission had promulgated no such rule or requirement and any issue as to whether or not such a rule was appropriate is not an issue and was not passed upon by the court. All the Supreme Court of Illinois did with regard to the construction of the 1942 amendment to the Emergency Price Control Act was to quote from and follow the deci-

sion of this Court in *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, where the court said, on page 499:

> "We are asked * * * to infer from a general expression of congressional policy the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers. This we are unable to do."

An examination of the Illinois Supreme Court's opinion attached to appellant's Jurisdictional Statement will indicate clearly that the Illinois Supreme Court simply accepted the interpretation and construction which this Court had placed on the amendment.

We must reiterate that in this proceeding the appellant is complaining, not that no notice of the proceeding was given the Office of Price Administration, but that the Commission was not informed that the notice had been served. The Office of Price Administration is not here asserting any failure on the part of appellees to furnish it with timely notice. We submit that this first contention of appellant presents no Federal question.

II

The Illinois Public Utilities Act as Construed by the Supreme Court of Illinois Is Not Repugnant to the Fourteenth Amendment to the Constitution and Does Not Deprive Patrons of the Railroad of Their Property Without Due Process of Law.

The appellant modestly asserts:

> "We (Illinois Commerce Commission) seek to present, for the first time, * * * the contention that where the carriers fail to present substantial evidence

justifying an increase, to set at naught an order denying such an increase, is to impose upon the carrier's patrons a confiscatory high rate."

There are so many obvious answers to the suggestion that the due process clause of the Fourteenth Amendment to the Federal Constitution is violated by the Illinois Public Utilities Act as interpreted by the Illinois Supreme Court that we will not burden this Court with an extended discussion.

In the first place, the court held that there was substantial evidence presented at the hearing before the Commission justifying an increase in rates, and, of course, there was no suggestion that the Commission could or should authorize rates to be increased in the absence of evidence. Second, no patron is deprived of his property by the statute as interpreted by the Supreme Court. The patron is free to use or to refuse to use the service offered. And next, it is the Illinois Commerce Commission, an agency of the State, and the Attorney General, who are urging that the Illinois Public Utilities Act as interpreted by the Illinois Supreme Court is unconstitutional.

It certainly is well settled that the jurisdiction of this Court cannot be invoked where the constitutionality of a State statute is attacked by the State itself, its officers or agencies, or by anyone who does not have a personal interest in the litigation. The question as to whether or not the State, a State agency, or officer may question the constitutionality of a State statute in the State courts is a local question, and this Court has consistently held that the constitutionality of a State statute cannot be so raised here. This familiar rule is stated in *Smith* v. *Indiana*, 191 U. S. 138, 148:

"Different considerations, however, apply to the jurisdiction of this court, which we have recently held

can only be invoked by a party having a personal interest in the litigation. It follows that he cannot sue out a writ of error in behalf of third persons. *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405; *Clark* v. *Kansas City,* 176 U. S. 114; *Turpin* v. *Lemon,* 187 U. S. 51; *Lampasas* v. *Bell,* 180 U. S. 276; *Ludeling* v. *Chaffe,* 143 U. S. 301; *Giles* v. *Little,* 134 U. S. 645. These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, *viz.,* the taxpayers, and in this particular the case is analogous to that of *Caffrey* v. *Oklahoma,* 177 U. S. 346. We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant, having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decision."

Pertinent is the language of the court in *Columbus & G. Ry. Co.* v. *Miller,* 283 U. S. 96, where we find, on page 99, the following:

"The question as to the validity of the Act of 1926 is raised only by the State Tax Collector in his official capacity, as one acting solely under the authority of the legislature whose requirement he contests. The only person taxed by the statute whose rights are before the Court is the petitioner, which seeks to uphold the state legislation which defines its liability and with which it has complied. The questions which the Collector sought to raise under the state constitution have not been passed upon by the state court. While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the State the constitutional validity of a state

> statute is a local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this Court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

"A litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage" where he seeks to have this Court pass upon the constitutionality. *Utah Power & Light Co.* v. *Pfrost*, 286 U. S. 165, 186.

The proposition urged by the appellant is frivolous and presents no question entitling it to be heard on appeal.

Conclusion

The Supreme Court of Illinois has here held that the Illinois Commerce Commission has failed to observe the limitations on its powers and the legislative standards fixed by the Illinois Public Utilities Act for the conduct of fair hearings.

The questions presented are purely local. The case as presented is not one in which an appeal is authorized from a State Supreme Court by the provisions of Section 237 of the Federal Judicial Code (U. S. Code Ann. Title 28, Sec. 344).

Respectfully submitted,

CARSON L. TAYLOR,
LARRY H. DUGAN,
Attorneys for Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 862

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

A. A. SPRAGUE AND BERNARD J. FALLON, AS RECEIVERS OF CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY,
Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS. No. 27898.

APPELLANT'S REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellant.

WILLIAM C. WINES,
Assistant Attorney General,
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THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 862

ILLINOIS COMMERCE COMMISSION,

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A. A. SPRAGUE AND BERNARD J. FALLON, AS RECEIVERS OF CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY,

Appellees.

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The appellee or appellees in each of the five cases, respectively, now docketed in this court under Nos. 858 to 862, inclusive, the titles of such cases being set forth in the margin,* have filed statements in opposition to this court's

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No. 860—*Illinois Commerce Commission v. Chicago, Burlington & Quincy Railroad Co.*

No. 861—*Illinois Commerce Commission v. Henry A. Scandrett, et al., trustees of property of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*

No. 862—*Illinois Commerce Commission v. A. A. Sprague and Bernard J. Fallon, as receivers of Chicago North Shore and Milwaukee Railroad Co.*

jurisdiction. Since these statements, although cast in slightly variant form, all suggest substantially similar arguments, this reply, though copies of it will be printed and filed under each of the five numbers and titles, respectively, will be identical in all of the five cases.

Appellees' suggestions in opposition to this court's jurisdiction are premised upon certain basic fallacies and reflect serious misconceptions of appellants' contentions. In our earnest view, these fallacies and misconceptions can be briefly pointed out.

The Issues Raised by the Emergency Price Control Act.

In appellants' original statement in support of jurisdiction, it was clearly indicated that the Illinois Commerce Commission and the Attorney General of Illinois, differing with appellees and with the Supreme Court of Illinois, conceived the import of the Emergency Price Control Act to be such as to assert congressional occupation of the field of price fixing in general, but to allow state and federal regulatory commissions to retain their ordinary jurisdiction over public utility rates, subject to the condition, which condition has the force of a jurisdictional prerequisite, that the Price Administrator be given *timely* notice of an intention to increase public utility rates and that the utilities consent to his *timely* intervention. It was further indicated that in our view, which view differs from that of the Supreme Court of Illinois and of appellees, the Illinois Commission as a result of this federal act, had at least the right, which it claimed, if not, indeed, the absolute duty, to ascertain, by matter apparent of record before the Commission and not otherwise, that a utility seeking a price increase had complied with this condition prerequisite to the Commission's jurisdiction.

Appellees dispute this construction of the law. We do

not deem this reply to be an appropriate means of debating the merits of the question raised by the conflict between appellants' reading and the Illinois Supreme Court's reading of the act in question. We think it sufficient to say that, upon the question whether the issue is substantial, as distinct from a consideration of the merits of the issue, this case is remarkably like the *Terminal Railroad Association* v. *Brotherhood of Railway Trainmen and Illinois Commerce Commission,* judgment affirmed, 318 U. S. 1, in which a railroad asserted that the Illinois Public Utilities Act, if construed to support an order relative to cabooses in interstate commerce, would bring that act in conflict with the Railway Labor Act, as well as with the Boiler Inspection Act, the Safety Appliance Act and the Interstate Commerce Act. This court regarded these contentions as conferring jurisdiction, though upon the merits the Illinois Supreme Court was affirmed.

But appellees, in addition to disputing appellants' construction of the Emergency Price Control Act, make the further assertion, which is very misleading unless properly understood, that the act was complied with. This contention is subject to two independent replies.

First: It does not appear, either of record in the proceedings before the Illinois Commission or otherwise, nor do appellees contend that they gave the notice in question **prior to the Illinois Commission's order permanently suspending the rates.** Moreover, they make the point, which we deem to verge upon absurdity, that the fact that the Price Administrator did not appear in the proceedings **in the courts on appeal** from the Commission's order is of some significance. Of course, the whole purpose of giving notice is to permit the United States Government, through the Director of Economic Stabilization or the Price Administrator, to present not only argument but **evidence** before the

Illinois Commission. When a record is closed and the evidence is in, there is little point in the United States Government's merely sending a lawyer into a courtroom to make arguments on a record already completed when the Commission will be represented by its own counsel.

If we are correct in our contention that *timely* notice to the United States Government was a prerequisite to the Commission's jurisdiction, it is no answer to say that, after the record was closed, such notice was given. Such notice would not be timely, nor would it subserve the purpose of the act, nor would it amount to compliance with a jurisdictional prerequisite. Summons after judgment, or notice after final decision, when it is too late to offer proof, can hardly be called jurisdictional notification.

Second: Appellees failed to make the fact of notice apparent upon the record of the Commission. It is quite true that the act contains no language requiring the public utility to make such notice apparent. But we apprehend that when a statute requires notice to be given as a prerequisite to the exercise of jurisdiction by a court or other tribunal, such court or other tribunal has at least the right, if not the duty, to take cognizance of a litigant's or a petitioner's failure to make an affirmative showing that jurisdictional prerequisites have been complied with.

One other observation is most important. Appellees make the highly sophistical argument that since the Commission in effect denied the increase, not only for want of jurisdiction but upon the merits, it gave the United States Government every substantial benefit that the Government could have had if it appeared. But appellees also complain of lack of evidence to support the Commission's order. A few words will suffice to convict the appellees of an egregious fallacy and self-contradiction in this position.

Appellees rely upon the Commission's denial of an in-

crease in order to argue that it would have been of no benefit to the Price Administrator to appear in a proceeding in which, even without his appearance, no increase was granted. But at the same time, they complain that the order denying the increase is invalid for lack of evidence. Now, if, as we contend, the purpose of the Emergency Price Control Act was to permit the Director of Economic Stabilization or the Price Administrator not only to appear but to intervene and offer evidence, and if it is likewise true as appellants contend, that no evidence militating against the increase was offered in his absence, then it can not be said that an order which appellees denounce as invalid for lack of evidence protects the federal government's policy, when it might very well have been that the federal government would have offered the very evidence of the absence of which appellees complain if notice had been given.

The simple truth is that appellees deliberately disregarded the command that, before they might increase their fares, they give notice to the United States government of the proceedings. The question whether this failure to give notice vitiated the proceedings is certainly substantial.

We therefore submit that the question whether Emergency Price Control Act justified the Illinois Commission in refusing the increases here involved is substantial and should be passed upon by this court.

Appellees' Fallacies With Respect to the Due Process Question.

Again let us say that we do not conceive it to be the proper office of this reply to debate the merits of the important questions which we seek to present and argue if jurisdiction is void. However, insofar as appellees'

assertions with respect to the due process question are addressed to this court's jurisdiction, as distinct from a consideration of the merits of the due process issue, we consider it proper to make the following brief observations:

In appellants' original statement in support of jurisdiction, it was made clear that we contended that appellees' evidence, although voluminous, was insufficient to support the increase sought in these proceedings because it failed to give the Commission any basis for those findings that appellees in fact sustained any loss or earned less than an adequate return.

We relied upon the principles that both findings and evidence in support of findings of material facts are required by the due process clause.

If appellants are correct in this contention, it would obviously make no difference whether, in writing their order, they indulged in speculation, treated the hearsay literature of economic records as evidence, or otherwise acted improvidently or wrongfully. **The fact would still remain that the carriers had sought an increase in rates without any adequate showing in support of such increase.** In short, the case would be in a posture like that of a case where a trial court has improperly received hearsay evidence for the defendant, misconceived the law, and otherwise erred in denying plaintiff relief but, where, nevertheless, the plaintiff has offered no competent evidence in support of his case. A judgment adverse to the plaintiff in such a case would be affirmed, even though highly improper evidence was received for the defendant.

Appellees advance another sophistry. They argue that the Illinois Commerce Commission has no standing in this court to assail a judgment on the ground that it denies to the public of Illinois due process of law.

Thus there cannot possibly be any merit in appellees' suggestion that the Illinois Commission decided the case on an adequate non-federal ground; for if there was no evidence to justify the increase, the carriers were not entitled to a reversal even though the commission may have erred fundamentally in its rulings and findings. If, as we say, to grant the carriers an increase would deny due process of law when they failed to show any loss, then to reverse an order denying such increase is *per se* unconstitutional no matter how egregious may have been the fallacies embodied in the Commission's orders.

There are two independent answers to this contention. In the *first* place, under both the Illinois and the federal law, the Attorney General (or other counsel for the public) may properly represent the public in a case affecting utilities' rates or services.

In the *second* place, appellees' argument involves the confusion, which is by no means uncommon, between two premises or propositions, one of which premises is unquestionably the law, while the other premise, though frequently asserted, is not and never has been the law.

It is unquestionably the law that only one affected by an unconstitutional statute may challenge its constitutionality. But it is *not* the law, and it never has been the law, that in order to challenge the constitutionality of a statute, the person "affected", if he is in fact "affected", must be the *person whom the unconstitutional features of the statute injure.* If a law or administrative ruling is unconstitutional as a whole, even if it is unconstitutional only because it injures one particular class, then any person, even though he be not a member of that class, may take advantage of the fact that an unconstitutional act is no act at all.

In the instant case, if we are correct in our contention

that the Illinois court required the Illinois Commission to do an unconstitutional act, namely, unconstitutionally injure the public, then certainly the Commission, every member of which is subject to the Constitution of the United States, may invoke the judgment of this court on appeal from such a decision.

Respectfully submitted,

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Attorney for Appellants.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

JAN 22 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 862

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

A. A. SPRAGUE AND BERNARD J. FALLON, AS RECEIVERS OF CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION

RALPH R. BRADLEY,
FREDERICK E. STOUT,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Notice as required by the Emergency Price Control Act was in fact given in this particular case and proof made thereof to the Illinois Commerce Commission prior to closing records before said Commission and prior to entry of its order	2
The decision of the Supreme Court of Illinois cannot be said to deprive the carriers' passengers of property without due process of law and presents no substantial federal question in that respect	5
The judgment of the said court rests on two or more grounds at least one of which is independent of a federal question and which is sufficient in itself to sustain the judgment	9
Appellant did not exhaust its remedies before the highest state tribunal	11
Conclusion	11

Table of Cases Cited

Banton v. *Belt Line Railway Corp.*, 268 U. S. 413, 45 Sup. Ct. 534	6
Illinois Commerce Commission v. *Sprague, et al., etc.*, 388 Ill. 138	5
Lynch v. *New York*, ex rel. Pierson, 293 U. S. 52, 79 L. Ed. 191, 55 Sup. Ct. 16	5,9
Norfolk & Western Ry. Co. v. *Conley*, 236 U. S. 605, 59 L. Ed. 745	6
Northern Pacific Ry. Co. v. *North Dakota* 236 U. S. 585, 59 L. Ed. 735	6
Mt. Carmel Public Utility and Service Co. v. *Public Utilities Commission*, 297 Ill. 303	6
Premier-Pabst Co. v. *Grosscup*, 298 U. S. 226, 80 L. Ed. 1155	9

Pa

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 75 L. Ed. 255.....
Smyth v. *Ames*, 169 U. S. 466, 42 L. Ed. 819.....

STATUTES CITED

Emergency Price Control Act..... 2,3,
Procedural Regulation No. 11 of the Office of Price Administration..... 3,

Page

7
6

,3,4

3,4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 862

ILLINOIS COMMERCE COMMISSION,

vs.

Appellant,

A. A. SPRAGUE AND BERNARD J. FALLON, AS RECEIVERS OF CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY.

Appellees

APPEAL FROM EUPREME COURT OF ILLINOIS.

STATEMENT OF APPELLEES AGAINST APPELLANT'S ASSERTED JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellees, John B. Gallagher and Edward J. Quinn, as Trustees of Chicago North Shore and Milwaukee Railroad Company, they having been duly substituted for the above named prior equity receivers, present this statement disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States pursuant to paragraph 3 of Rule 12 of said court.

I.

Notice As Required by the Emergency Price Control Act Was in Fact Given in This Particular Case and Proof Made Thereof to the Illinois Commerce Commission Prior to Closing of Records Before Said Commission and Prior to Entry of Its Order.

As far as the Emergency Price Control Act cited by Appellant in its jurisdictional statement is concerned, the action of the Illinois Commerce Commission and the construction and application of the Illinois Public Utilities Act made by the Supreme Court of Illinois does not present, in this particular appeal, any conflict between the State and the Federal act and did not draw in question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States or laws of the United States because, contrary to the careless and unwarranted statements of Appellants, the required notice was, in this case, actually given to the Transportation and Public Utilities Division of the Office of Price Administration at Washington, D. C., together with consent to the timely intervention by the Price Administrator in the proceedings before the Illinois Commerce Commission on behalf of the Director of Economic Stabilization, in accordance with Procedural Regulation No. 11 of the Office of Price Administration, *prior* to the time the record in this case before said Commission was closed, and proof of such notice was given to the Commission in the form of an exhibit setting forth the complete notice, said exhibit having been received in evidence prior to the time the Attorney General, as attorney for the Illinois Commerce Commission, completed cross-examination and prior to the entry of the order of said Commission.

Furthermore, the order of the Commission entered on December 22, 1942, in this case made no reference whatever to any want of notice under the Emergency Price Control Act or want of jurisdiction because of failure to give such notice, regardless of what it may have said on that point in the other cases.

In this particular appeal Appellant, in its jurisdictional statement, has made, apparently through inadvertence or failure to read the record, a series of absolute misstatements as to the above mentioned notice. It erroneously stated that in each case the record was closed before September 15, 1942, whereas this case was not concluded before said Commerce Commission and marked heard and taken until December 19, 1942, the date on which the Attorney General of Illinois, as attorney for the Illinois Commerce Commission, completed cross-examination of Appellees' witnesses. Appellant also erroneously stated that none of the railroads or their trustees made it appear of record that they had notified the Price Administrator, whereas, as above stated, notice was given in this case, together with timely consent to intervene, and proof thereof made to the Commission in the form of an exhibit received in evidence by the Commission as Carrier's Exhibit 19.

The records before the Commission and before the Supreme Court of Illinois show that the notice in question was given on November 25, 1942, and received by the Office of Price Administration on November 26, 1942. (See abstract of record (at page 169) and additional or supplemental abstract of record (at pages 398 to 405, inclusive) before the Supreme Court of Illinois which printed documents have been included by Appellant in its Praecipe for Record.) Said notice was given within fourteen days after the Office of Price Administration issued Procedural Regu-

lation No. 11, stated to be set forth in Appendix 1, of Appellant's jurisdictional statement.

The record will also disclose that at no time, notwithstanding receipt of said notice, did the Office of Price Administration intervene, or seek to intervene, in the proceedings before the Illinois Commerce Commission, either before the entry of the Commission's order on December 22, 1942, or before the denial of a rehearing on January 12, 1943, or before either the Circuit Court of Cook County or the Supreme Court of Illinois during the various stages of appeal, and that, contrary to the misstatement of Appellant in its jurisdictional statement, said Office of Price Administration did not seek before the Supreme Court of Illinois to appear as *amicus curiae* in this case.

It is, therefore, respectfully submitted that in this case wherein the required notice and consent to timely intervention was actually given and proof thereof made to the Illinois Commerce Commission before completion of the cross-examination and before the entry of the Commission's order, the ruling of the Supreme Court of Illinois with respect to the jurisdiction of the Illinois Commerce Commission as affected by the Emergency Price Control Act cannot be said, when applied to the facts in this case, to give an interpretation to the Illinois Public Utilities Act which would make that act repugnant to the Constitution of the United States or the Emergency Price Control Act enacted thereunder, and did not draw in question the validity of a statute of the State of Illinois on the ground of it being repugnant to the Constitution or laws of the United States.

Since the Federal statute was complied with as to notice required thereunder, there cannot possibly be any question as to the right of the Illinois Commerce Commission to have granted the relief sought from it by these Appellees with-

out such action being insubordinate to the Federal constitution or said Federal statute.

This Court, in the case of *Lynch* v. *New York, ex rel. Pierson,* 293 U. S. 52, 79 L. Ed. 191, 55 Sup. Ct. 16, said:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Here the record affirmatively shows the federal statute as to notice had been complied with, so there was no conflict between the state and federal statute to be decided; and it cannot be said that the judgment as rendered could not have been given without deciding the federal question, because there was no federal question to be decided.

It is further respectfully submitted that these Appellees should not be prejudiced by the misstatements of Appellant as to the facts of record regardless of the fact that such misstatements were indubitably the result of inadvertence.

II

The Decision of the Supreme Court of Illinois Cannot Be Said to Deprive the Carriers' Passengers of Property Without Due Process of Law and Presents No Substantial Federal Question in That Respect.

As the Supreme Court of Illinois points out in its decision of September 19, 1944 (388 Ill. 138—Advance Sheets), in each case testimony and exhibits were admitted in evidence showing a substantial deficit in the income from operation of the suburban service for the year 1941 and

prior to that time and that in no case would the proposed increases in rates be sufficient to overcome the deficit shown. It also points out that there was testimony and exhibits showing the allocation of direct expenses to the suburban service and the apportionment of expenses jointly incurred in that service and the through passenger and freight and express services, that the basis of such allocation and apportionment was given in detail, and that no evidence was offered except that introduced by the carriers.

In its opinion said Court found that the Commission was in error in disregarding the evidence before it and in acting upon its own opinion and conclusions not based upon any evidence in the cases in the matter of allocation of joint expenses to suburban service.

The Court then points out that the Commission, after being furnished with statements of the system income showing system increases in 1942 over 1941, indulged in a pure speculation and assumption without any evidence in the record to support it to the effect that there had probably been a substantial increase in revenue from the suburban service during 1942.

The Court then goes on to point out that the dominant note of the approach of the Commission was to treat the suburban service as more or less of a by-product of railroad operations as a whole and that any revenue over out-of-pocket expenses received contributes that much to the final prosperity of the carrier.

The basis for this theory of the Commission, the Court points out, was contrary to law. In support of that finding the Court cited and quoted from *Northern Pacific Ry. Co.* v. *No. Dakota,* 236 U. S. 585, 59 L. ed. 735; *Norfolk & Western Ry. Co.* v. *Conley,* 236 U. S. 605, 59 L. ed. 745; *Banton* v. *Belt Line Railway Corp.,* 268 U. S. 413, 45 Sup. Ct. 534; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. ed. 819; *Mt. Carmel Public Utility and Service Co.* v. *Public Utilities Commis-*

sion, 297 Ill. 303. The portions of those cases quoted by the Supreme Court of Illinois clearly show that said Court considered those cases as authority for the general proposition that a state may not include a commodity or class of traffic, and instead of what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal.

The decision of the Supreme Court of Illinois, which did no more than refuse to permit Appellant to indulge in speculation and assumption based on system earnings when the evidence before it showed an operating deficit on the suburban service, is sought to be given an unusual and specious twist by claiming that it would have the effect of forcing the Commission to make *fiat* holdings and thereby deprive the car riders of due process.

It is submitted that there is nothing in the interpretation by the Supreme Court of Illinois of the aforementioned cases decided by this Court which is in conflict with what this Court has said therein or in subsequent cases. The most that can be said is that the Supreme Court of Illinois compelled Appellant to adhere to the evidence of record rather than to indulge in speculation and assumption based on matters outside the record or based on matters which relate to system figures as distinguished from figures relating to the class of service under consideration which showed a deficit.

As this Court held in *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 75 L. ed. 255, an extreme nicety is not required in making segregation or apportionment as to interstate business, only reasonable measures being essential. In the instant case, using the most reasonable and logical formula available, there was a complete segregation of all interstate business, whether passenger or freight, from the Illinois suburban service, and also a segregation

of street car and bus and freight business in the Illinois suburban territory. There is, therefore, nothing strange or unconstitutional to be found in the fact that the Supreme Court of Illinois held the segregation to be adequate. Neither the Commission nor anyone else offered in evidence any different segregation.

While it is true this Court holds that a rate-making body is not restricted to any set formula, it has not held, it is submitted, that such rate-making body may indulge in conjecture and speculation not substantiated by evidence or compel a carrier to transport a particular class of traffic either at less than cost, or for a compensation that is merely nominal, merely because system earnings during the progress of the hearings showed a profit.

Appellant states that it conceives it to be its duty to the public, enjoined upon it by a proper reading of the Constitution of the United States, to prevent unjust discrimination between the various classes of service. The record shows that the Interstate Commerce Commission had already granted a 10 per cent increase, not only as to interstate passenger traffic, but also as to intrastate non-commutation passenger service over which said Interstate Commerce Commission assumed jurisdiction under 13th Section proceedings under the Interstate Commerce Act. Consequently, Appellant was without authority to raise or lower those rates covered by Interstate Commerce Commission action to remove discrimination even had such discrimination existed. As a matter of fact, this was not a rate discrimination case involving alleged discrimination between commutation rates as such compared with interstate and intrastate non-commutation rates, but was an effort on the part of Appellees to obtain increases on a class of transportation which was being conducted at an operating deficit. Neither Appellant nor anyone else introduced any evidence in the case to rebut the showing made by Appellees as to

the operating deficit in their suburban operations. Instead, as the Supreme Court of Illinois points out, Appellant sought to off-set the evidence introduced by indulging in speculations and assumptions unsupported by evidence.

It cannot, therefore, be said that the decision of the Supreme Court of Illinois had the effect of depriving anyone of its property without due process guaranteed by the 14th Amendment of the Constitution of the United States; and the contention of Appellant that a substantial federal question is involved cannot, it is respectfully submitted, be sustained; nor has the Supreme Court of Illinois decided a federal question in conflict with this Court's decisions.

Furthermore, the Illinois Commerce Commission cannot be said to be injured or deprived of its property contrary to the Fourteenth Amendment to the Constitution of the United States. Therefore, it is in no position to raise such a constitutional question. *Premier-Pabst Co.* v. *Grosscup*, 298 U. S. 226, 80 L. Ed. 1155.

III.

The Judgment of the Said Court Rests On Two or More Grounds At Least One of Which Is Independent of a Federal Question and Which Is Sufficient in Itself to Sustain the Judgment.

In *Lynch* v. *New York, ex rel. Pierson*, 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16, this Court held that where the judgment of the state court rests on two grounds, one involving a federal question, the other not, or it does not appear upon which of the two grounds the judgment was based, and the ground independent of the federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

The attention of this Court is directed to that part of the opinion of the Supreme Court of Illinois reading as follows:

> "The orders cannot be sustained for the further reason that they contain no proper and essential findings. Section 65 of the Public Utilities Act (Ill. Rev. Stat. 1943, chap. 111 2/3, par 69) provides that the commission shall make and render findings concerning the subject matter and facts inquired into, and enter its order based thereon. In *Chicago Railways Co.* v. *Commerce Com. ex rel. Chicago Motor Coach Co.*, 336 Ill. 51, we said: 'Section 65 of the Commerce Commission act requires the commission to make and enter findings concerning the subject matter of facts inquired into and enter its order based thereon. Such findings must be specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it.'"
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> "The orders in the four cases here under consideration do not comply with the mandatory requirements of section 65 of the Public Utilities Act. They do not contain any findings as required by that section. Said orders are void for the further reason that they are not based upon the evidence and are predicated upon matters wholly outside the evidence offered before the commission. They are in form merely arguments and conclusions based upon assumptions and speculations and are not supported by the evidence in the records. The orders are arbitrary, unreasonable and unlawful, and cannot be sustained."

It is, therefore, clear that Appellant, the Illinois Commerce Commission, which is a creature of the Illinois legislature, must, according to the highest court in the state, comply with the mandatory provisions of the act under which it is created, and that the action of the Supreme Court of Illinois in interpreting that portion of the state

statutes contains no federal question and is sufficient in itself to sustain the decision of said state court.

In addition to this, as has heretofore been pointed out, the judgment of the state court does not in fact rest upon any federal question as far as this particular appeal is concerned because notice was given in this case as required by the Emergency Price Control Act and proof thereof given to the Appellant, said Illinois Commerce Commission, and because the decision of the Supreme Court of Illinois does not have the effect of depriving car riders of property without due process.

IV.

Appellant Did Not Exhaust Its Remedies Before the Highest State Tribunal

Although Rule 44 of the Supreme Court of Illinois provides for rehearings, Appellant elected, as it admits in its jurisdictional statement, to accept the decision of the Supreme Court of Illinois as final without asking for a rehearing and did not ask for a rehearing.

Conclusion

For the reasons aforestated it is submitted that an appeal does not lie from said decision of the Supreme Court of Illinois to this Court.

Respectfully submitted,

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No. 860. ILLINOIS COMMERCE COMMISSION *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO.;

No. 861. ILLINOIS COMMERCE COMMISSION *v.* SCANDRETT ET AL., TRUSTEES; and

No. 862. ILLINOIS COMMERCE COMMISSION *v.* SPRAGUE ET AL., RECEIVERS. Appeals from the Supreme Court of Illinois. February 26, 1945. *Per Curiam:* The appeals are dismissed for the reason that the judgment of the court below in each case is based upon a non-federal ground adequate to support it. *George F. Barrett,* Attorney General, and *William C. Wines,* Assistant Attorney General, for appellant. *Messrs. M. L. Bell, W. F. Peter, Harry E. Boe* and *Martin L. Cassell, Jr.* for appellees in No. 859. *Mr. Eldon Martin* for appellee in No. 860. *Mr. Carson L. Taylor* for appellees in No. 861. *Mr. Ralph R. Bradley* for appellees in No. 862. Reported below: 388 Ill. 138, 57 N. E. 2d 384.